Reserved

IN THE HIGH COURT OF UTTARANCHAL AT NAINTIAL

Writ Petition No. 162 (M/B) of 2004

Garhwal Mandal Vikas Nigam Ltd.
74/1 Rajpur Road, Dehadun
Through its Managing Director …….. Petitioner

Versus

1. Uttaranchal High Court at Nainital
   Through the Registrar.

2. M/s Krishna Travel Agency,
   936, Daraganj, Allahabad through
   Its Managing Partner Shri V.K. Sharma
   s/o late Shri S.P. Sharma,
   r/o 936, Daraganj, Allahabad …… Respondents

Coram: Hon. P.C. Verma, A.C.J.
Hon'ble M.M. Ghildiyal, J.
June 05, 2004.

[Per Hon. P.C. Verma,J.]

The petitioner has field the instant petition seeking a writ of certiorari to set aside the order dated 09.05.2003 and 25.11.2003 contained in Annexure no. 1 and 2 to this writ petition passed in Arbitration Petition No. 8 of 2002 – M/s Krishna Travel Agency Vs. Garhwal Mandal Vikas Nigan Ltd.

Brief facts giving rise to the present petition are that on 01.04.1997 an agreement was entered into between Garhwal Mandal Vikas Nigam Ltd., hereinafter mentioned as 'Nigam' and M/s Krishna Travel Agency, opposite party no. 2, hereinafter mentioned as Agent, for booking of Leave Travel Concessional Ticket (L.T.C. facility) of the employees of the different departments of the State/Central Government, who availed the said facility through Nigam. As per clause 1 of the agreement, it has been provided that the agency shall provide bus to the Nigam for its use, for conducting L.T.C. tours of the said Government employees. U.P. Government by means of an order dated 07.08.1987 has certified that the Nigam was authorized to conduct L.T.C. tour of employees of the Central

Government or State Government / Government undertaking including Banks, to all places of India. On availing the L.T.C. tour facility through Nigam the employees of Central/State Government were entitled for reimbursement.

On 21.06.2002, the opposite party no.2 raised a dispute under sections 11 and 13 of the Arbitration and Conciliation Act, 1996 before the Managing Director of the Nigam, whereby the opposite party no.2 had sought payment of money amounting to Rs.24,10,268/- as principal and Rs. 23,62,026/- as interest from the Nigam. The said reference was decided by the Managing Director of the Nigam on 05.12.2002 and the same was rejected on the ground firstly that the reference was beyond limitation and secondly as per clause 18 of the agreement he was simply a Mediator and, therefore, he was not competent to decide and arbitrate as per clause 18 of the agreement.

Clause 18 of the said agreement is reproduced as under:

> "In case a dispute arises in the implementation of the contract, then the managing Director of the Nigam shall be the Mediator, and the decision given by him in deciding the dispute shall be binding on Nigam as well as Agent (both the parties)."

When the dispute raised by the opposite party no.2 was rejected by the Managing Director of the Nigam on 05.12.2002, the opposite party no.2 filed an application for appointment of Arbitrator before the Hon'ble Chief Justice u/s 11 of the Act. On the application of the opposite party no.2, this Court vide order dated 09.05.2003, appointed Mr. Justice (Retd.) J. C. Gupta, Former Judge, High Court, Allahabad as sole Arbitrator. Thereafter, the petitioner moved Misc. Recall Application No. 5594 of 2003 in Arbitration Petition No. 8 of 2002 to recall the order dated 09.05.2003, which was dismissed by this Court on 25.11.2003.

The present petition has been field on the ground that there was no arbitration agreement between the petitioner and the opposite party no.2 so that the dispute raided by the opposite party no.2 could be referred to the Arbitrator under section 11 of the Arbitration and Conciliation Act, 1996. It is also submitted that clause 18 of the agreement dated 01.04.1987 no

where spells out any of the necessary conditions which are required for an arbitration agreement. It only provides for redressal of dispute between the parties by a process of mediation for which the Managing Director of the Nigam had been empowered to act as Mediator, whose decision was to be final. The dispute which could be decided by the Mediator was confined to the workability of the Agreement and, therefore, the dispute raised by the opposite party no.2 was not at all covered by clause 18 of the agreement. The mediator is not an Arbitrator and, therefore, he cannot decide the dispute as an Arbitrator under the pro0visions of the Arbitration and Conciliation Act, 1996. Therefore, the opposite party no.2 wrongly preferred a Reference under the Arbitration and Conciliation Act, 1996 before the managing Director of the Nigam, who has to act only as a mediator. As such, the reference made by the opposite party no. 2 before him was rightly rejected by the managing Director of the Nigam as he was not empowered to act as an Arbitrator. It is also submitted that the Hon'ble High Court had legally erred in holding that clause 18 of the agreement refers to resolution of dispute between the parties through the intervention of the Managing Director of the Nigam, which indicates the intention of the parties to the agreement is to refer the mater to the Arbitrator. It is against submitted that Hon'ble High Court was misled by the opposite party no.2, therefore, an Arbitrator was wrongly appointed by the High Court and this Court erred in holding that the arbitral Tribunal can go into the question of the existence of arbitration agreement and, therefore, the very existence of the arbitration agreement, which had been challenged by the petitioner was not fully considered by the Hon'ble the Chief Justice of Uttaranchal High Court.

It is lastly submitted that the apex Court in the case of *Wellington Associate Limited Vs. Kirit Mehta* reported in (2000) 4 S.C.C. 272, and *Konkan Railway Corporation Ltd. and another* Vs. Rani Construction Private Limited. Reported in (2002) 2 S.C.C. 388 has clearly held that the question of existence of an arbitration agreement can be decide at the stage of application U/s 11 under Arbitration and conciliation act, 1996 by the Hon'ble the Chief Justice and may not be left open for being decided under section 16 of the Act by the Arbitral Tribunal.

Mr. Umesh Chandra, learned Senior Counsel referred the meaning of mediator. According to **Oxford Dictionary** a Mediator is " a person, who intervenes between two parties, especially for the purpose of effecting reconciliation-an intercessor, person who brings about agreement or settles a dispute by mediation." Conclusion – "mediation and conciliation are synonymous". He further referred **Black's Law Dictionary** to give the meaning of mediation " a method of non binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutual agreeable solution. Also termed conciliation." **Chamber's 21st** Dictionary gives the meaning of mediation-" To act as the agent seeking to reconcile the two sides in a disagreement; to intervene and settle (a dispute) through reconciliation. To reconcile means "to put them on friendly terms against especially after a quarrel". According to learned counsel for the petitioner, clause 18 is not an Arbitration clause as the Managing Director is only a *mediator*.

The above noted dictionary meanings of Mediator, Mediation, Reconcile, and conclusion, make it very clear that while in process of mediation and reconciliation, the mediator settles the dispute by consent of parties through process of reconciliation. There is no decision in the process of mediation or reconciliation. Parties come to agreement by process of mediation. Mediation is one excellent way to resolved a dispute's true underlying issues.

It is settled law that the dictionary meaning is not conclusive and the word has to be understood in the reference and context the word is used. The apex Court in the case of Ram Narain Vs. State of U.P. reported in A.IR. 1957 SC 18 has observed in para 10 of the judgment as under:

> "It has rightly pointed out that it is no sound principle of construction to interpret expression used in the Act with reference to their use in another Act. The meaning of words and expressions used in an Act must take their colour from the context in which they appear……."

The Hon'ble Krishna Aiyer, J. in the case of State Bank of India Vs. N. Sundara Money, A.I.R. 1976 SC 1111 has observed in para 8 of judgment as under:

> "…… But dictionaries are not dictators of statutory construction where the benignant mood of a law, and more emphatically, the definition clause furnish a different denotation"…..

In the case of Commissioner of Income tax Orissa Vs. N.C. Budhraja and company and another, reported in AIR 1993 SC 2529, Hon'ble B.P. Jeevan Reddy, J. observed as under:

> "……In the scheme and context of the provision, it would not be right to isolate the word "thing" , ascertain its meaning with reference to law Lexicons and attach to it a meaning which it was never intended to bear. A statute cannot always be construed with the dictionary in one hand and the statute in the other. Regard must also be had to the scheme, context and to the legislative history."

The apex Court in the case of DLF Universal Ltd. Vs. Appropriate Authority AIR 2000 SC 1985 at page 1992 in para 10 has observed thus,:

> "In C.B. Gautam Vs. Union of India (1993) 199 ITR 530, reference was made to an earlier decision by this Court in the case of K.P. Varghese Vs. Income Tax Officer (1981) 131 ITR 597: (A.I.R. 1981 SC 1922) were the following passage was quoted with approval:
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> "The Court observed that the task of interpretation of a statutory enactment is not a mechanical task. The famous words of Judge Learned Hand of the United State4s of America that " ……it is true that the words used even in their literal sense are the primary and ordinarily the most reliable source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning" were quoted with approval".

Now, we may analyse clause 18 of the agreement in order to reach to a correct meaning of the word "Mediator" and the words, namely, (i) if any dispute arises in the implementation of the contract; (ii) then the Managing Director of the Nigam will be mediator; and (iii) both (Nigam and Agent) will be bound by the decision given the said dispute. It is most important that a decision is to be given by the managing Director on the said dispute which is referred to him under this clause. To give a decision it is imperative on the Managing Director to give opportunity to both the parties to put forward their case supported with evidence, and decision has to be

given after giving full opportunity to the parties. Here, the decision given under the agreement will amount to an Award against which the aggrieved party has a further remedy. Thus, the Managing Director is not setting the dispute through reconciliation or mediation. Rather, he will give a decision on the dispute. As such, the Mediator under the clause has to act as an Arbitrator. The word “mediator” has been loosely used in place of “Arbitrator” in clause 18 of the Agreement. In the context of clause 18, the word “mediator” takes colour of “Arbitrator”. This intention of the parties is clear from the clause 18 of the agreement. Under clause 18 both the parties agreed in advance that they will be bound by the decision of the Managing Director. Therefore, we hold that in clause 18 of the agreement the word mediator will mean Arbitrator and clause 18 is an Arbitration clause.

No other point is pressed.

For the reasons recorded above, the petition lacks merit and is hereby dismissed.

No order as to costs.

(P.C. Verma, A.C.J.)

(M.M. Ghildiyal, J.)

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